UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, -against- LLESH BIBA, Defendant.	:	**MEMORANDUM AND ORDER** 09-cr-836 (DLI)

DORA L. IRIZARRY, Chief Judge:

Before the Court is Llesh Biba's ("Defendant") Motion to Dismiss Counts Three and Six of the Superseding Indictment, which are the charges related to possession and brandishing of a firearm in furtherance of crimes of violence in violation of 18 U.S.C. §§ 924(c)(1)(A)(i), 924(c)(1)(A)(ii). (Def. Mot. to Dismiss ("Second Motion to Dismiss" or "2nd Mot. to Dismiss"), Dkt. Entry No. 23; Superseding Indictment, Dkt. Entry No. 21.) On August 25, 2016, Defendant moved to dismiss Count Three and Count Six of the initial indictment, which purported to charge the same offenses. (Dkt. Entry No. 14.) On November 7, 2016, the Court granted Defendant's first motion to dismiss the indictment to the extent that the charges for brandishing a firearm pursuant 18 U.S.C. § 924(c)(1)(A)(ii) alleged in Counts Three and Six were dismissed, without prejudice, because they were not properly stated in the initial indictment. *United States v. Biba*, — F. Supp. 3d. —, 2016 WL 6583635 (E.D.N.Y. Nov. 7, 2016), Dkt. Entry No. 20 (the "November 7 Opinion"). Thereafter, the government obtained a superseding indictment (the "Superseding Indictment") that is identical to the initial indictment except that it now adds the phrase "which firearm was brandished" at the end of Counts Three and Six. (*See* Superseding Indictment.)

On December 14, 2016, Defendant filed the Second Motion to Dismiss on the grounds that (i) the Superseding Indictment violates the doctrine of specialty because it charges Defendant with an offense that contains different statutory elements than those set forth in the government's extradition request to Canada, and (ii) the Superseding Indictment was brought after the applicable statute of limitations period had expired as to all counts. (2nd Mot. to Dismiss.) The government opposes the motion. (Gov. Opp. to 2nd Mot. to Dismiss, Dkt. Entry No. 26.)

DISCUSSION[1]

A. The Superseding Indictment Does Not Violate the Rule of Specialty.

Defendant contends that the Superseding Indictment violates the United States' extradition treaty with Canada, which provides that "[a] person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting State for an offense other than that for which extradition has been granted," unless "[t]he requested state has consented to his detention, trial, punishment for an offense other than that for which extradition was granted or to his extradition to a third State . . . ." Treaty Signed at Washington Dec. 3, 1971;, T.I.A.S. No. 8237 (Mar. 22, 1976) ("U.S.-Canada Treaty"), Art. 12(1).

The threshold question for the Court, therefore, is whether the charge of brandishing a firearm in furtherance of crimes of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii), which is properly set forth in the Superseding Indictment, actually constitutes a different offense from mere possession, for purposes of the U.S.-Canada Treaty. Defendant contends it does because the extradition order was premised on the simple firearm possession charges, and it subsequently cannot be modified unilaterally by the federal government to permit defendant's prosecution for the brandishing offenses. (Def. Mot. at 7.)

However, in making this argument, Defendant conflates the constitutional protections he enjoys under the Fifth and Sixth Amendments, which provided the basis for the Court's dismissal

[1] The relevant background is set forth in the November 7 Opinion, — F. Supp. 3d. at —, 2016 WL 6583635 at *1-3.

of Counts Three and Six in the November 7 Opinion,[2] with the logic underlying the rule of specialty. As the Second Circuit Court of Appeals recognized long ago, the basis for the rule of specialty set forth in *United States v. Rauscher*, 119 U.S. 407 (1886) is not a concern about protecting the rights of a defendant, but rather comity:

> Accepting the proposition that these principles would forbid trial of Paroutian for murder or some other offense totally unrelated to the traffic in narcotics, we nevertheless believe that Paroutian was tried in conformity with the law governing extradition. The basis of this rule, discussed in *United States v. Rauscher* . . . is comity. It is designed to protect the extraditing government against abuse of its discretionary act of extradition. So the test whether trial is for a 'separate offense' should be not some technical refinement of local law, but whether the extraditing country would consider the offense actually tried 'separate.'

United States v. Paroutian, 299 F.2d 486, 490-91 (2d Cir. 1962). In *Paroutian*, the court ultimately found no violation where a defendant was extradited from Lebanon pursuant to an indictment issued in the Southern District of New York for narcotics trafficking, but ultimately was tried in the Eastern District of New York for two separate counts (receipt and concealment of heroin) not covered by the original indictment. *Id.* at 490. The Court stated it did not believe "that the Lebanese, fully apprised of the facts as they were, would consider that [the defendant] was tried for anything else but the offense for which he was extradited, namely, trafficking in narcotics." *Id.* at 491.

Since *Paroutian*, other courts have found that the government may "present additional facts or amplified allegations, 'so long as [they are] . . . *directed* to the charge contained in the request for extradition.'" *United States v. Masefield,* 2005 WL 236443, at *2 (S.D.N.Y. Feb. 1, 2005) (quoting Restatement (Third) of Foreign Relations Law of the United States § 477, comment c

[2] As set the Court held in the November 7 Opinion, the government's failure to charge "brandishing" in the original indictment, did not fully apprise Defendant of an element of 18 U.S.C. § 924(c)(1)(A) that increases the penalties to which he would be subject if found guilty. *See* November 7 Opinion, — F. Supp. 3d. at —, 2016 WL 6583635 at *7-8.

(2005)) (emphasis and alterations added in *Masefield*); *see United States v. Levy*, 25 F.3d 146, 159 (2d Cir. 1994) (finding that, even if the defendant "was extradited on the basis of the one narcotics conspiracy charge in his initial arrest warrant, the Rule of Specialty would still not have been violated by his subsequent trial on the five drug counts in his indictment" because the they would not constitute separate offenses); *United States v. Rossi*, 545 F.2d 814 (2d Cir. 1976) (per curiam) (finding no violation of the rule of specialty where extradition charge covered 1969-72 and indictment covered 1965-73).

Here, as in *Paroutian*, the foreign government appears to have been made fully aware of the factual allegations underlying the federal charges he ultimately faced. As the government notes in its opposition brief, the "Record of the Case for Prosecution" (the "Record," Gov. Opp. to 2nd Mot. to Dismiss Ex. C, Dkt. Entry No. 26) that was submitted to Canada in support of the extradition request included facts indicating that a firearm was brandished in the commission of the acts constituting Counts Three and Six. With respect to Count Three, the Record states that Defendant's co-conspirator Shelton Willis admitted to a cooperating witness that he had "displayed a handgun to" a woman who had been restrained during the commission of the robbery. (*Id.*) With respect to Count Six, the Record states that a female victim would testify that she had met her landlord outside of her apartment "where the men pistolwhipped him and then her when she tried to intervene." (*Id.*) Both of these descriptions meet the statutory definition of "brandish[ing]" a firearm. *See* 18 U.S.C. § 924(c)(4) (defining "brandish" with respect to a firearm as "display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person").

As explained in the November 7 Opinion, there is no doubt the original indictment was deficient for failing to set forth a necessary element of the offense it purported to charge. However, after the Superseding Indictment remedied the constitutional violation, the issue here is only whether the added brandishing charge in the Superseding Indictment is considered a "separate offense" from the possession charge such that proceeding on the indictment would offend international comity. *See Paroutian*, 299 F.2d at 490-91. Based on the precedent set forth above, the clear answer is no.

Because the Court finds that the brandishing charge is not an offense separate from mere possession, the Court necessarily rejects Defendant's argument that the U.S.-Canada Treaty or the government's own policies required the government to seek Canada's affirmative waiver of the rule of specialty from Canada.[3] However, should the government become aware of any objection from Canada regarding the government's prosecution of Defendant, the government immediately must inform the Court in writing, as such an objection may present a basis for dismissing the brandishing charges from Counts Three and Six of the Superseding Indictment. *See United States v. Garavito-Garcia*, 827 F.3d 242, 247 (2d Cir. 2016) ("Here, because the Government of Colombia has not first made an official protest, Garavito-Garcia lacks standing to invoke the extradition treaty as a basis for the dismissal of the indictment.") (quoting *United States v. Suarez*, 791 F.3d 363, 367 (2d Cir. 2015) (internal punctuation omitted); *cf. Fiocconi v. Attorney Gen. of U. S.*, 462 F.2d 475, 481 (2d Cir. 1972) ("To be sure, the United States has not made a preliminary

[3] The government represents that it has "alerted the State Department about the prosecution of the defendant and the State Department confirmed that Canada has not made an official protest concerning this superseding indictment." (Gov. Opp. at 8.) The Court agrees with Defendant that this statement—which appears to have been worded carefully to avoid stating that Canada actually is aware of the Superseding Indictment—was presented inappropriately in the government's brief without a supporting affidavit. However, as the Court holds that the Superseding Indictment does not present a separate offense, the Court need not consider whether Canada waived the rule of specialty in rendering its decision today.

showing in Italy with respect to the New York indictment as it did concerning the Massachusetts one. However, we presume the United States is willing to submit such proof if Italy desires . . . .")

B. The Charges in the Superseding Indictment Are Not Barred by the Statute of Limitations.

Defendant's alternative argument is that the relevant statute of limitations has expired as to all charges in the Superseding Indictment. The government presents three theories to counter this argument: (i) the firearms charges in the Superseding Indictment relate back to the original indictment because the charges were not materially broadened or substantially amended; (ii) Defendant waived any statute of limitations argument in his cooperation agreement with the government; and (iii) pursuant to 18 U.S.C. § 3290, the statute of limitations was tolled from the time Defendant fled to Canada until his extradition. For the reasons set forth below, the Court finds that Defendant's agreement with the government to forgo the right to raise a statute of limitations defense to any future prosecutions operates as a valid waiver of his present challenge to the Superseding Indictment. As a result, the Court need not address the government's other arguments.[4]

Defendant's agreement with the government provided, in pertinent part, that "prosecutions that are not time-barred by the applicable statutes of limitation as of the date this agreement is signed, *including but not limited to the Pending Charges*, may be commenced against the defendant . . . notwithstanding the expiration of the statutes of limitation between the signing of this agreement and the commencement of any such prosecutions." (*See* 2nd Mot. to Dismiss Ex. B

[4] The Court notes that to assess properly whether Defendant's flight to Canada was "to avoid arrest or prosecution," an evidentiary hearing may have been required. *See United States v. Florez*, 447 F.3d 145, 151 (2d Cir. 2006) (upholding a district court's conclusion after an evidentiary hearing that the evidence indicated to a "high probability" that defendant fled and concealed himself "for the sole purpose of avoiding prosecution").

(the "Agreement") (emphasis added).) The "Pending Charges" were defined as those then "pending against Biba in docket number M-08-42," as of September 2, 2008. (*Id.*)

Defendant contends that the Agreement was invalid because it was "wholly one-sided, providing the government every benefit and offering Mr. Biba none," and, therefore, it was not backed by adequate consideration. (2nd Mot. to Dismiss at 12.) Specifically, Defendant argues that, because the Agreement was made without prejudice to the reinstatement of the charges at any time, it conferred no actual benefit upon Defendant.

Agreements between the government and a criminal Defendant are to be interpreted according to ordinary principles of contract law. *See United States v. Rosemond*, 841 F.3d 95, 107 (2d Cir. 2016) ("Proffer agreements are contracts to be interpreted according to ordinary principles of contract law. Like all contracts, proffer agreements must be interpreted to give effect to the intent of the parties.") (citations and internal quotation marks omitted). Under these principles, Defendant is correct that such agreements must be supported by adequate consideration. *See United States v. Brunetti*, 376 F.3d 93, 95 (2d Cir. 2004) (per curiam) ("[A] guilty plea can be challenged for contractual invalidity, including invalidity based on a lack of consideration.")

However, the Court disagrees that the Agreement at issue here did not provide sufficient consideration. To the contrary, the agreement provided Defendant with important benefits to which he otherwise would not have been entitled had he not entered into the Agreement. In particular, the government bound itself to the promise that the Pending Charges "shall be dismissed without prejudice," which is an obvious benefit to Defendant that the government was not otherwise required to confer upon Defendant. (*See* Agreement.) Although Defendant correctly points out that the government reserved the right to reinstitute the Pending Charges, or others, at their sole discretion, the fact remains that the dismissal to which the government agreed was still of value to Defendant. Importantly, the government's promise to dismiss the charges resulted in Defendant's immediate release from custody and allowed him to engage in activities with law enforcement that may have allowed him to reduce the sentencing guideline range to which he ultimately would be subject.

In addition, while the Agreement may be one-sided, such a power imbalance is typical of agreements between the government and a criminal defendant and is not a justification for rendering such an agreement invalid. *Cf. United States v. Mergen*, 764 F.3d 199, 208-09 (2d Cir. 2014) ("[C]ourts construe plea agreements strictly against the Government. This is done for a variety of reasons, including the fact that the Government is usually the party that drafts the agreement, and the fact that the Government ordinarily has certain awesome advantages in bargaining power.") (quoting *United States v. Ready*, 82 F.3d 551, 559 (2d Cir. 1996), *superseded on other grounds as stated in United States v. Cook*, 722 F.3d 477, 481 (2d Cir. 2013)). Indeed, in this Court's view, a finding that the agreement at issue here lacked sufficient consideration would turn the proffer process on its head. Therefore, the Court concludes that the Agreement is valid and that, through the Agreement, Defendant has waived his statute of limitations defense.

CONCLUSION

For the reasons set forth above, the Second Motion to Dismiss is denied in its entirety.

SO ORDERED.

Dated: Brooklyn, New York
March 6, 2017

/s/
DORA L. IRIZARRY
Chief Judge